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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JUAN DAVILA-BAJANA,

PLAINTIFF,

-VS-

TIM HOLOHAN, et al.,

DEFENDANTS.

FILED
06 AUG 18 P 1:48
CLERK
U.S. DISTRICT COURT

CIVIL ACTION #04-253 (ERIE)

DISTRICT JUDGE: MCGLAUGHLIN

MAGISTRATE JUDGE: BAXTER

CONSOLIDATED MOTION FOR, AND BRIEF IN SUPPORT OF:

RECONSIDERATION AND WITHDRAWAL OF

ORDER OF 08/08/06 ADOPTING MAGISTRATE BAXTER'S

AMENDED REPORT AND RECOMMENDATION OF 07/17/06

COMES NOW Juan Davila-Bajana, pro se (Plaintiff); and hereby respectfully submits his Motion to have the Court Reconsider and Withdraw its Order of 08/08/06 Adopting Magistrate Judge Baxter's Amended Report and Recommendation. Same is based on the below argument that the Court has inadvertently Ruled on the Magistrate's submission before it was ripe.

JURISDICTION

RULE 60. Relief From Judgement Or Order.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgement

order, or proceeding for the following reasons: (1)
mistake, inadvertence, surprise, or excusable neglect;
....

Federal Rules of Civil Procedure, Rule 60.

RELEVANT PROCEDURAL BACKGROUND

On or about 07/17/06 Magistrate Judge Baxter Issued an Amended Report and Recommendation with respect to the above captioned cause. Plaintiff received same and promptly began to compile his Objections and realized that he required additional documents which he did not have.

In order to assure that Plaintiff had the necessary time to collect the documentation and compile his Objections, he promptly and timely filed for an Enlargement of Time to file his Objections. Same was Granted by magistrate Baxter on 08/03/06; and Enlarged the Time to file Plaintiff's Objections to and including 08/23/06.

In the interim District Judge McGlaughlin has Issued an Order, without Plaintiff having filed his Objections as permitted by statute, Adopting the Amended Report and Recommendation. This is an obvious oversight on the Court's part and in no way can reflect the accurate disposition of the Magistrate's R&R. Same being true as the Enlargement of Time caused the ripening of the R&R for disposition by the Court to be delayed.

Also in this interim Plaintiff has made an additional review of his personal legal materials and has found most of the materials which he deemed necessary to file his Objections to the Amended R&R. As such, Plaintiff diligently compiled his Objections, and was nearly finished when he received the Order Adopting

the Amended R&R. So he continued his compilation of the referenced Objections and then diligently compiled the instant Motion to be relieved from the Court's inadvertent err.

DISCUSSION

Plaintiff will not belabor this Honorable Court with an extended argument with respect to the propriety of the Withdrawal of the Court's Order of 08/08/06. This is so as a simple reference to Federal Rules of Civil Procedure, Rule 6(a) -- Computation of Time -- should suffice.

This is so as the Rule clearly states that the time for the filing of pleadings is calculated by not counting the day of the Order and to be inclusive of the last day. In the present cause, as the Rule also notices, that when the day is set by the Court that day is included in the calculation. Which is dispositive of the inquire as to whether or not the Order should be withdrawn. Because the day the Magistrate Judge Baxter set for the filing of the Objections had not, nor has it yet, transpired.

So the District Judge making a Ruling on the pending Amended R&R is clearly a inadvertent err and a mistake which cannot be attributed to any party -- least of which would be Plaintiff. Plaintiff had timely filed for, and been Granted, an Enlargement of Time and as such the disposition of the Amended R&R is/was not ripe before the Court.

The equitable manner with which to deal with this dilemma is to rescind the Order in question and accept the Objections as filed contemporaneously herewith. This will allow for Plaintiff to be afforded his "one full bite of the apple of justice".

CONCLUSION

As set forth more fully above, though in a truncated manner due to the simplicity of the procedural misstep, Plaintiff was Granted an Enlargement of Time to file his Objections to Magistrate Judge Susan P. Baxter's Amended Report and Recommendation. As such, the disposition of same is/was not, at the time of District Judge Sean J. McLaughlin's Ruling, yet Ripe before the Court. Whereby the Order Adopting the Amended R&R is not actually dispositive simply because it was premature.

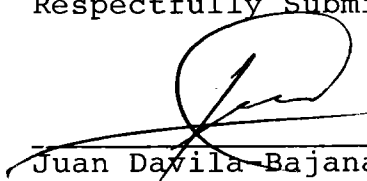
The equitable manner to deal with this err is to simply Withdrawal the Order of 08/08/06 and allow Plaintiff's Objections, as now before the Court, to be heard and to be the basis of a de novo review. See: 28 U.S.C. §636(b)(1)(B).

WHEREFORE PLAINTIFF PRAYS, that the Honorable Sean J. McLaughlin will Withdrawal the Court's Order of 08/08/06, Adopting the Amended Report and Recommendation of Magistrate Judge Baxter.

AND FURTHERMORE, conduct a de novo review pursuant to the Magistrate's Act based on the Objections filed by Plaintiff.

AND FURTHERMORE, Grant Plaintiff any additional Relief the Court deems just and proper.

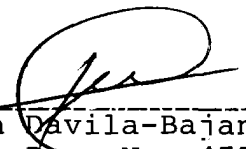
Respectfully Submitted,



Juan Davila Bajana, Pro Se
Fed. Reg. No. 47580-053
FCI McKean
P.O. Box 8000
Bradford, PA 16701

DECLARATION

I, Juan Davila-Bajana, hereby declare and affirm, under the penalty of perjury pursuant to 28 U.S.C. §1746(2), that the foregoing pleading is true and correct to the best of my knowledge and recollection, this 13th day of August, 2006.




Juan Davila-Bajana, Pro Se
Fed. Reg. No. 47580-053
FCI McKean
P.O. Box 8000
Bradford, PA 16701

CERTIFICATE OF SERVICE

I, Juan Davila-Bajana, hereby certify that I served true and correct Originals of the foregoing pleading and accompanying Declaration, by first-class postage prepaid surrender to prison officials, this 14th day of August, 2006, to:

1. Clerk of the Court
U.S.D.C. for W.D. PA
17 S. Park Row
Erie, PA 16501

2. Paul D. Kovac, AUSA
U.S. ATTORNEY'S OFC.
700 Grant St., Ste. 400
Pittsburgh, PA 15219



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Bradford, PA 16701

August 14, 2006

Clerk of the Court
U.S.D.C. for W.D. PA
17 South Park Row, Rm. A280
Erie, PA 16501

RE: DAVILA BAJANA VS. HOLOHAN, ET AL., C.A. NO. 04-253-ERIE.

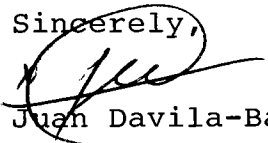
Dear Sirs:

Please find enclosed my Motion to Withdrawal the Court's Order of 8/8/06 and my Objections to Magistrate Judge Baxter's Amended Report and Recommendation.

I believe that the both you and the Court will find everything that you need to proceed with my cause. Should you determine that you require more from me, please contact me at the address above.

As always, I thank you for your time and efforts in assisting me in staying prompt and timely before the Court.

Sincerely,


Juan Davila-Bajana

✓

enc. YES

cc. FILE; AUSA KOVAC.